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No. 79-81

In The
Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS E. COFFY, PETITIONER

v.

REPUBLIC STEEL CORPORATION, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF ON PETITION FOR WRIT OF CERTIORARI

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Counsel for respondent has previously indicated by letter that respondent does not oppose the petition for a writ in this case. Respondent submits that the courts below correctly applied the law to the facts. However, respondent acknowledges that the Court of Appeals for the Third Circuit reached a contrary result. Respondent would welcome the granting of the writ so that this conflict might be resolved. Respondent believes that an examination of the facts and application of the law will result in an affirmance of the result reached by both lower courts in the instant case.

RESPONSE TO PETITIONER'S DISCUSSION OF REASONS FOR GRANTING THE PETITION

In seeking the granting of the writ in this case, petitioner has argued two points. Petitioner has noted the existing conflict in the decisions of the Sixth and the Third Circuits. As indicated above, respondent acknowledges that conflict.*

The second argument advanced by petitioner is that it is the instant case which has been wrongly decided. Respondent submits that the lower courts in the instant case have reached the correct decision.

The issue in this case is whether a returning veteran must be given supplemental unemployment benefit (SUB) credits for the entire time during which he was absent from private employment, even though such units are earned only through work. The collective bargaining agreement in effect in the steel industry clearly provides that the returning veteran does not receive such SUB credit units. Rather he is treated exactly as any other employee on leave of absence as required by law.

This Court has of course previously articulated the general principles of law in this area. In *Foster v. Dravo Corp.*, 420 U.S. 92 (1975), it was resolved that vacation benefits earned through a bona fide work requirement need not be provided to a returning veteran who had not met the work requirement. In *Alabama Power Co. v. Davis*, 431 U.S. 581 (1977), it was resolved that time in the military must be credited as service time for purposes of computing pension entitlement. This Court has not previously addressed the SUB credit issue.

As can be seen by reviewing the two detailed opinions by the District Court in the instant case, the trial judge clearly understood the principles articulated in both the

*Petitioner also alleges a conflict with the Seventh Circuit decision in *Akers v. General Motors Corp.*, 501 F.2d 1042 (1974). There is no real conflict. There the court found no bona fide work requirement.

Foster and the *Alabama Power* decisions. The trial judge discussed both decisions at length. He then properly applied those principles to the evidence adduced in the case. Such evidence clearly demonstrated the bona fide nature of the work requirement. Indeed, the evidence on that issue was undisputed.

The entire argument of the petitioner is based on an assertion that the "real nature" of the SUB credit is tied to seniority. But that is not the case. Petitioner tries to analogize SUB credits to pension benefits. But the analogy is faulty. Certainly pension entitlement is keyed to seniority. Basic eligibility is dependent upon time in service. The amount of the pension payment is tied to time in service.

That is not the case with SUB credits. As is shown in the record below, no employee may accumulate more than 52 credit units. Credit units are generally earned only by work. The amount of the benefit is not tied to seniority. Thus a 20-year employee may well receive exactly the same benefit as a 3-year employee. SUB credits are short-term benefits, earned through work. They are a classic wage substitute which is earned in the short term and exhausted in the short term.

The opinions of the District Court in the instant case demonstrate that the trial judge thoroughly analyzed these issues. He correctly found that the collective bargaining agreement should be applied precisely as it was written. Petitioner is incorrect when he asserts that the instant case was wrongly decided.

Indeed, it is ironic that the principal relationship between SUB credits and seniority is a negative one. SUB credits are exhausted during times of lay-off. Generally, lay-off priority is determined by seniority. Thus the more seniority an employee has, the less likely he is ever to need his SUB credits.

The steel industry has long perceived the distinction between pension benefits and SUB credits. As the record below demonstrates, the collective bargaining

agreement for the industry provides that the returning veteran is given seniority credit for his time in the military. Thus, long before the *Alabama Power* decision, the steel industry credited military service time for pension purposes. No such credit is given for SUB credits, however, because the benefits are entirely different.*

Respondent will not belabor the point in this brief. Respondent acknowledges the conflict between the decisions reached in the instant case and the decision reached by the Third Circuit in *Hoffman v. Bethlehem Steel Corp.*, 477 F.2d 860 (1973). Respondent believes that the lower courts in the instant case are correct and would welcome the opportunity to have this Court resolve the conflict by hearing this case.

CONCLUSION

Respondent does not oppose the petition for a writ of certiorari, but does submit that the courts in the instant case have correctly ruled.

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*The benefits are different from the standpoint of the veteran as well. In a two or three year stint in the military, the veteran gains no pension benefit. Thus, if he loses pension time from his civilian employment, he never regains it. SUB credits, however, protect against lay-off. Since the veteran has been under no threat of lay-off during his stint in the military, he has lost nothing. Indeed he has gained in that sense.

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